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IN THE

Supreme Court of the United States

NO. 281 OCTOBER TERM, 1937

ALUMINUM COMPANY OF AMERICA,
Appellant,

v.

THE UNITED STATES OF AMERICA.

APPELLANT'S REPLY BRIEF.

WILLIAM WATSON SMITH,
FRANK B. INGERSOLL,
LEON E. HICKMAN,
Solicitors for Aluminum Company of America.

1025 Union Trust Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

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The issues have been narrowed by the omission from the brief of Government counsel of any argument to the effect that they were not properly before the Pennsylvania Court. And apparently the contention is abandoned that the ancillary petition in the Pennsylvania suit is an unauthorized action against the United States.*

There appear in the brief of Government counsel five contentions which we desire to answer as briefly as

* A short footnote at page 41 of the brief of Government counsel states that the immunity of the United States from suit extends to cross bills and ancillary suits, but no attempt is made to apply that assertion to the case at bar. Nor would the two cases there cited sustain such an application. In the first, *Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 504-505 (1918, opinion by Mr. Justice Van Devanter), the United States had not been a party to the original suit in which the cross bill against it was filed. In the second, *De Groot v. United States*, 5 Wall. 419, 431 (1867, opinion by Mr. Justice Miller), the holding was simply that a set-off pleaded by a defendant in an action instituted by the United States could not be carried to the point of an affirmative judgment against the Government.

may be. They are (1) a forced analysis (brief, pp. 10-25) of the Pennsylvania and New York petitions and a citation of certain authorities upon which Government counsel base the contention that the petitions are not substantially identical; (2) an argument (brief, pp. 25-46, 51-52) that there is no possibility of the entry of conflicting decrees by the Pennsylvania and New York Courts and that there is no harm inherent in concurrent decrees of two courts regulating the same subject matter; (3) an unwarranted classification (brief, pp. 32-46) of the cases which have granted injunctions in aid of the jurisdiction of a first court; (4) an argument (brief, pp. 52-59) that an injunction would defeat the statutory rights of the United States under the Sherman Act; and (5) an argument (brief, pp. 59-64) that the Expediting Court was properly invoked.

I.

THE PENNSYLVANIA AND NEW YORK SUITS ARE SUBSTANTIALLY IDENTICAL IN SUBJECT MATTER AND ISSUES.

Erroneous Assumption. The Expediting Court decided this issue against the Aluminum Company on a fundamentally erroneous assumption of fact concerning the averments in the Pennsylvania petition. That Court was under the impression, stated in its opinion, that:

> "The United States expressly conceded that the monopoly enjoyed by Aluminum Company *at the time of suit* was lawful because of its ownership of unexpired basic patents. . . .
>
> "When we examine the respective petitions, it becomes obvious that whereas the United States in the Pennsylvania suit treated the existence of a monopoly as wholly lawful . . . by the time it brought the New York suit the issue had become

not whether any specific device was lawful but whether the monopoly which existed in 1937 was lawful." (R. 184; italics ours.)

The Expediting Court was in fundamental error on this point. The Pennsylvania petition conceded that the Aluminum Company's monopoly had been lawful until the expiration of its basic patents *in 1909* (R. 28), a position correctly stated by Government counsel in their brief (p. 20). The Pennsylvania petition was not filed *until 1912*. The Government's position in the Pennsylvania petition was the exact opposite of the understanding of the Expediting Court, the Pennsylvania petition not only complaining of alleged illegal devices whereby the alleged monopoly was maintained (R. 17-25), but of the alleged monopoly itself and the power inherent in it to exclude competitors, actual and prospective (R. 25-26, 30), concluding with the statement that the petition was brought (R. 30):

". . . in order that the entire aluminum industry may be open to all who may desire to enter therein, and that competition may arise . . . and the monopoly therein be destroyed, ..."

In the second prayer of the petition the Pennsylvania Court was asked to decree that the defendant (R. 31):

". . . has attempted and is now attempting unlawfully to monopolize, and has unlawfully monopolized, a part of interstate and foreign trade and commerce in aluminum in its various forms, crude, semifinished, or fabricated, including the raw materials necessary in its manufacture, to wit, bauxite and alumina. . . ."

Furthermore, in addition to the drastic restrictions imposed by the consent decree, paragraph 7 thereof recites that said paragraph is drawn (R. 69-70) "to prevent

the unlawful acquisition by defendant of a monopoly in any branch of manufacturing from crude or semifinished aluminum . . .."

In view of the Expediting Court's basically erroneous understanding of the Government's position on monopoly in the Pennsylvania petition, it is submitted, with deference, that its opinion is without weight on this issue.

Analysis of New York petition. Government counsel analyze the New York petition (brief, footnote, pp. 21-22) as containing "three causes of action alleged in the three sections of the petition, each of which terminates with the charge that the facts alleged therein constitute a violation of the Sherman Act." The first cause of action is said to be a charge in paragraph 53 that the Aluminum Company is an illegal monopoly *per se* (brief, footnote, pp. 21-22). The second cause of action, in the words of the brief of Government counsel (p. 17), is said to be "a far-reaching scheme for the restraint of foreign competition", and the third (brief, p. 18) is the charge that "appellant's monopoly has been acquired and maintained by unfair and oppressive tactics."

Government counsel's brief does not deny that the second and third causes of action are confined to charges enjoined by paragraphs 1, 6 and 7 of the Pennsylvania decree (R. 64-65, 69-71). It is only said that many of the restraints and oppressions have originated since 1912 (brief, pp. 17-18), a distinction fully answered in appellant's brief (pp. 26-28).

The remaining cause of action which Government counsel contend is stated in its New York petition is a charge of monopoly *per se*. We do not believe that this issue is raised by the New York petition for the reasons stated at pages 15-17 of appellant's brief, but, even if it is

raised, it was as clearly raised in paragraphs XI and XIV (R. 25-26, 28-30) of the Pennsylvania petition. The Government charged in both instances that the Aluminum Company was monopolizing the industry, the percentage of monopolization alleged in the Pennsylvania petition (R. 12-17) and in the New York petition (R. 105-108) not varying substantially. It is alleged at page 16 of Government counsel's brief that the two petitions disclose that the assets of the company have increased substantially and that its percentage of the alumina used in the United States in the manufacture of aluminum has increased from 80% to 100%, and that the Aluminum Company admits that it now produces 100% of the virgin aluminum manufactured in the United States and uses 100% of the bauxite used in the United States for the production of aluminum. The Pennsylvania petition averred (R. 25) that the Aluminum Company then manufactured all of the virgin aluminum produced in this country, from which it follows that the Aluminum Company then used all of the bauxite devoted to that purpose in the United States.

Certainly it is of no legal significance that the alleged percentages of monopolization of certain branches of the business have changed slightly through the years or that new plants have been erected or new subsidiaries incorporated, and yet such trivialities are detailed by Government counsel in their brief (p. 17).

One need only note that the Pennsylvania decree closes with the statement that it has been "entered upon the assumption that the defendant, Aluminum Company of America, has a substantial monopoly of the production and sale of aluminum in the United States" (R. 72) to realize that the monopoly charge in the New York suit is a repetition of an old allegation. The Expediting

Court found in this charge "only such similarity as may exist between an infant and a full grown man" (R. 183). It is submitted that if we accept this statement, as does Government counsel at page 17 of their brief, there is established complete legal identity. Further, the Aluminum Company was a lusty infant as early as 1911 because in the Pennsylvania petition it is said that in that year the company produced 44,000,000 pounds of aluminum (R. 11) and that its assets were $27,000,000 (R. 27).

Apparently realizing that the Pennsylvania Court has assumed, by its decree, a regulatory jurisdiction of the matters complained of in the New York petition, Government counsel fall back upon the argument (brief, footnote, p. 13 and p. 19) that the Pennsylvania decree is, by resort to the allegations of the Pennsylvania petition, to be construed in some undefined way as something narrower than it was meant to be or than its language imports. Suffice it to say that the Pennsylvania decree was entered by *consent,* is unambiguous in its terms, and is quite responsive to the Pennsylvania petition. Pleadings may clear up an ambiguity in a decree but they should never be used to create an ambiguity in an otherwise unambiguous decree. See *St. Louis, K. C. & C. R. Co. v. Wabash Ry. Co.,* 152 Fed. 849, 852 (C. C. A., 8th Circ., 1907, opinion by Judge Sanborn). Furthermore, a consent decree partakes of the character of a voluntary agreement between the parties* and may well be valid although it goes beyond the pleadings. 2 *Freeman on Judgments,* Section 664. The Pennsylvania decree, while comprehensive, is not so broad that practical

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* *The Ansaldo San Giorgio I v. Rheinstrom Bros. Co.,* 73 F. (2d) 40, 41 (C. C. A., 2d Circ., 1934, opinion by Judge Swan), affirmed 294 U. S. 494 (1935, opinion by Mr. Justice Roberts); *Wilson v. Haber Bros.,* 275 Fed. 346, 347 (C. C. A., 2d Circ., 1921, opinion by Judge Hough).

understanding or compliance is impossible. It is specific enough that every charge made in the New York petition can be classified under a specific prohibition of the Pennsylvania decree.

Concededly (Government counsel's brief, p. 15), the "subject matter of the New York petition . . . is necessarily related to the subject matter of the 1912 suit. Concededly (Counsel's brief, pp. 24-25), the adjudication of the Pennsylvania Court concerning the five contracts is *res adjudicata*. But the concessions are inadequate. The Pennsylvania decree dealt not only with the five contracts but with many alleged existing practices. It also contained a comprehensive regulation of future practices. The Pennsylvania decree was plainly drawn to bring about a perpetual regulation of the Aluminum Company so that, in the words of the Pennsylvania petition (R. 30) "the entire aluminum industry may be open to all who may desire to enter therein, and that competition may arise . . . and the monopoly therein be destroyed. . . ."

The close identity of the Pennsylvania and New York suits is again shown by Government counsel's own comparison of the Pennsylvania decree and the decree sought in the New York suit (brief, p. 52):

> "Both are intended to compel obedience to the Sherman Act, and the affirmative injunctive provisions sought are harmonious. The only difference lies in the fact that the New York petition seeks more drastic relief."

The cases cited at pages 18-19 of the brief of Government counsel in support of their contention that facts occurring subsequent to 1912 defeat the continuing jurisdiction of the Pennsylvania Court are plainly inapplicable. Neither case [*Memphis City Bank v. Tennessee*, 161 U. S. 186 (1896, opinion by Mr. Justice Peckham), or

Watson v. Jones, 13 Wall. 679 (1872, opinion by Mr. Justice Miller)] involved a continuing regulation of future conduct, such as the Pennsylvania decree provided. Both cases turned on the circumstance that the facts which had intervened between the first and second suit raised a *different* issue than was litigated in the first suit. In the *Memphis City Bank* case the first suit adjudicated that stockholders of an *insurance* company were exempt from certain taxes. Between the first and second suits the insurance company had been changed to a *bank,* a circumstance which defeated the binding effect of the first adjudication, not because the facts were new but because they presented a fundamentally different question. In *Watson v. Jones* the first suit was concerned with whether certain individuals had been elected elders of the Walnut Street Presbyterian Church of Louisville, Kentucky. Subsequent to the first suit, the issues incident to the Civil War divided the church into two groups, and the second suit dealt with the question as to which of two bodies should be recognized as the Walnut Street Presbyterian Church. As the court said of the second suit, 13 Wall. 679 at p. 717:

> "The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim."

Here, again, it was not that the facts were new, but that they raised different issues, that was significant.

Additional relief immaterial. The contention is next advanced by Government counsel (brief, pp. 22-25) that the relief sought in the two suits is different because the Government sought to *regulate* the Aluminum Company as a monopoly in the Pennsylvania suit, while in the New

York suit it seeks to *dissolve* it (in the sense of breaking it into smaller units) as a monopoly. It is submitted that this is a distinction without a difference. Both suits are equity actions under the Sherman Act. Both complain that the Aluminum Company has monopolized and restrained commerce. Both charge that the Aluminum Company has the power to restrain actual and potential competition. The Government sought a regulatory injunction in both suits. It would have been germane to both suits to seek a division of the Aluminum Company into smaller units. This is merely regulation somewhat more stringent in degree than a supervisory injunction. If there is to be any effective control of the Government's assertion of the right first to enjoin, then re-enjoin and then dissolve the Aluminum Company, it must necessarily be exercised by one court, not several.

In the concluding paragraph of the argument of Government counsel that the relief sought in the two suits is different, they concede (brief, p. 24) that:

> "It is not disputed that *res judicata* may apply to issues arising in a subsequent suit where different relief is sought."

It is submitted that this necessary concession to long-established principles completely nullifies their contention that the severer form of regulation sought in the New York suit is a reason for denying an injunction.

Additional parties immaterial. Government counsel also contend (brief, pp. 14-15) that an injunction should not issue to restrain them from proceeding in the New York suit against the Aluminum Company, its officers, directors and 100% subsidiaries, because there are 23 additional parties defendant to the New York suit. Government counsel concede at the outset, as they must, that (brief, p. 14):

> ". . . issues adjudicated between two parties in one suit are *res judicata* as to them in a subsequent suit where there are additional parties. This elementary proposition is not disputed. . . . ."

This "elementary proposition" should be as faithfully observed where a continuing regulatory injunction of the first court is sought to be avoided because additional parties defendant have been added in a suit in a second court seeking the same as well as more drastic regulatory relief. Furthermore, a reading of the New York petition or the repeated summaries of its purposes in the brief of Government counsel (pp. 3-4, 16, 17, 18, 21-22, 23) makes it obvious that the New York petition is directed at the Aluminum Company of America, its officers, directors, and 100% subsidiaries. The 23 remaining parties are defendants only because of alleged relationships with Aluminum Company. No relief is sought against any of them except to regulate or terminate their alleged relationships with the Aluminum Company. Their addition as parties defendant was perhaps thought to facilitate their presence at the trial of the New York suit, but it has no other discernible advantage.

Cases cited. The cases cited by Government counsel (brief, pp. 10-13) to establish the lack of identity and subject matter between the Pennsylvania and New York suits are so unlike the situation here presented as to suggest, rather, a complete absence of authority in support of its contention. ***In none of the cases was there involved a continuing regulation.*** No cited case, if language be considered in context, remotely resembles the legal problem here presented.

Pacific Live Stock Co. v. Oregon Water Board, 241 U. S. 440, (1916, opinion by Mr. Justice Van Devanter),

cited at page 11 of Government counsel's brief, was totally unlike the case at bar.. A state Water Board instituted statutory proceedings in which all claimants of riparian rights were compelled to prove their claims. A claimant, who had been a plaintiff in an earlier *private* litigation over certain of these water rights, unsuccessfully sought an injunction against the hearing by the Water Board, on the basis of the prior adjudication. The parties in interest were different, the purposes of the adjudication quite dissimilar and one litigation was private in character and the other a quasi-public proceeding. Of course no injunction was issued.

Buck v. Colbath, 3 Wall. 334 (1866, opinion by Mr. Justice Miller), involved a plea in bar in a second suit and is apparently cited (Counsel's brief, pp. 12-13) for the concluding sentence in the quotation that the second court "must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." The limited application of the above quoted sentence is made plain by the language of this Court *immediately* following the sentence, to-wit (*id.* at p. 345):

> "*For example,* a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. . . . The true effect of the rule in these cases is, that the court of chancery

cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts.

"The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances, when persons not parties to the first proceeding are prosecuting their own separate interests in other courts.

"The case before us is an apt illustration of these remarks." (Italics ours.)

It is submitted that on the equities of the case at bar and the authorities cited in appellant's brief, the preliminary injunction (R. 141) should have been followed by a final injunction in order to protect the clearly asserted jurisdiction of the Pennsylvania Court over the subject matter of the Pennsylvania suit.

II.

The Dangers Inherent in Concurrent Decrees.

Government counsel attempt to demonstrate (at pp. 27-31 of their brief) that it is not possible for the Aluminum Company to be subjected to the danger of conflicting decrees by the Pennsylvania and New York Courts and (at pp. 51-52 of its brief) that the possibility of two harmonious decrees affords no ground for enjoining the New York suit against the Aluminum Company, its officers, directors and 100% subsidiaries.

Let us assume for the sake of argument that the New York Court enters a decree which harmonizes with the Pennsylvania decree so perfectly that it is an exact duplicate of it. It would seem to be self-evident that two such concurrent or coincident decrees are fundamentally objectionable. By hypothesis, each court would retain regulatory jurisdiction over the future conduct of the Aluminum Company. Any petition by either the United States or the Aluminum Company for an interpretation or a modification or an enlargement of these twin decrees would have to be presented in both courts. Any alleged violation of the twin decrees would presumably be litigated in both courts. It is not only within the realm of reason but quite likely that the courts would on occasion reach different conclusions. If so, conformity with one decree would lead to disobedience of the other. Under the jurisdiction retained (by hypothesis) by the New York Court, the Aluminum Company might petition under the decree for the right to purchase securities of other companies, much as it did in the Pennsylvania suit in 1922. If such a petition were favorably acted upon, it would then be necessary for the Aluminum Company to present a similar petition to the Penn-

sylvania Court, which Court could grant or refuse permission as it saw fit.

Next, let us assume that the New York Court enters a decree enjoining some but not all of the practices enjoined by the Pennsylvania decree. In that situation the Aluminum Company might conduct itself in conformity with the New York decree, but in so doing violate the Pennsylvania decree. Or does the Government contend that the New York decree would supersede the Pennsylvania decree, and, if so, would not the New York decree amount to a collateral attack on the Pennsylvania decree?

As a third possibility, let us assume that the New York Court decrees greater regulation than is contained in the Pennsylvania decree and directs the division of the Aluminum Company into competing companies. Would the Pennsylvania decree remain in effect or would it be supplanted by the New York decree? If the Aluminum Company thereafter sought the approval of the Pennsylvania Court in the purchase of securities, as it did in 1922 (R. 73), and the Pennsylvania Court gave that approval, how could the decree be carried out without violating the New York decree?

Finally, let it be assumed that the Government obtains a complete victory in New York. Paragraphs 61 and 62 of the New York petition (R. 111-112) charge that the acquisition of the foreign securities approved by the Pennsylvania Court by supplemental decree in 1922 (R. 77) was illegal. A decree to this effect would either be in conflict with the Pennsylvania decree or a complete nullification of it.

It seems to us inescapable that regardless of whether the New York decree imposes greater or less

regulation, or the same as is contained in the Pennsylvania decree, the result is either the strong possibility of conflict during the indefinitely projected administration of those decrees or the nullification of the Pennsylvania decree.

It is argued at pages 29-31 of the brief of Government counsel that the Aluminum Company has no rights under the Pennsylvania decree and that as a consequence the New York Court can enter any decree it chooses without giving the Aluminum Company the right to obtain an injunction. Certainly the Aluminum Company thought it obtained the right to make a large investment in 1922 (Supplemental Pennsylvania decree, R. 77). And how can it be said that the Pennsylvania decree operates only in the Government's favor when it is the clear implication of that decree that the company is to have the conditional right to do business within the limits of the decree, subject always to the right of the Pennsylvania Court to change those limitations? The last portion of the decree (R. 72) sets forth in five paragraphs methods of doing business which are affirmatively permitted under the decree. The decree further provides in substance (R. 72) that so long as the Aluminum Company has a substantial monopoly of the production and sale of aluminum in the United States, it may do business only under the terms of the decree, subject to the right of the company to petition for modification not oftener than once in three years. Certainly this was intended to confer upon the company the right to do business, subject to the regulation of the Pennsylvania Court.

The existence of a residuum of rights in a defeated litigant is aptly illustrated by *Swift v. Black Panther Oil Co.*, 244 Fed. 20, 27 (C. C. A., 8th Circ., 1917, opinion by Judge Sanborn) where an injunction was granted

to protect such rights from re-litigation in a second court. A Federal Court had entered a consent decree in a land controversy requiring the lessee, Panther Co., to pay one-fourth of the proceeds from oil and gas production to a federal receiver for the benefit of other parties in interest. The Federal Court later enjoined a state suit which threatened the three-fourths interest remaining in the Panther Co., although it was claimed in opposition that the second suit did not "deprive the federal court of the possession of the land" or prevent its receipt of the one-fourth interest in the proceeds. The injunction was granted in order to protect the rights remaining in the Panther Co. under the consent decree and subsequent agreement with the receiver.

Even if it were true that the Aluminum Company had no rights under the Pennsylvania decree, the mischief inherent in two concurrent or coincident regulatory decrees of independent courts, regardless of whether those decrees conflict in terms, is apparent from the foregoing illustrations (pages 13-14, *supra*). Consequently the Pennsylvania and New York Courts, as well as the Aluminum Company, are entitled to protection against such a situation.

Government counsel argue (brief, p. 30) that the Pennsylvania consent decree is neither a contract nor binding upon the United States. Admittedly the decree is not a contract in the sense that it cannot be modified by the Pennsylvania Court without the further consent of both parties: *United States v. Swift & Co.*, 286 U. S. 106, 115 (1932, opinion by Mr. Justice Cardozo). Subject to this single qualification, it is submitted that this decree, entered pursuant to agreement, is one "which has become binding upon all parties, and upon which the

International Company [here, the Aluminum Company] has, in the exercise of good faith, been entitled to rely": *United States v. International Harvester Co.*, 274 U. S. 693, 703 (1926, opinion by Mr. Justice Sanford).

It is contended at page 32 of the brief of Government counsel that the Aluminum Company has virtually conceded that the New York suit is not designed to reverse the Pennsylvania decree, because the company did not assign as error the 7th finding of fact of the Expediting Court (R. 176). However, this same issue is raised by the assignments, as error, of the Court's 8th and a portion of its 9th findings of fact (R. 192). Further assignments on this issue would have involved needless multiplicity.

It is urged by Government counsel (brief, pp. 49-51) that the Aluminum Company had an adequate remedy by presenting the Pennsylvania decree as a plea in bar in the New York suit. This contention overlooks the fact that the Pennsylvania Court has the duty to protect its jurisdiction. It overlooks the further fact that the Aluminum Company would not have the *right* to have such a plea in bar heard in advance of a trial of the New York suit on its merits, such plea being determinable in advance of trial only "in the discretion of the court": Equity Rule 29. Further, courts have repeatedly granted injunctions restraining litigants from bringing suit in another jurisdiction on the sole ground that the first suit was *res adjudicata*. *Root v. Woolworth*, 150 U. S. 401, 411-412 (1893, opinion by Mr. Justice Jackson); *Wilson v. Alexander*, 276 Fed. 875 (C. C. A., 5th Circ., 1921, opinion by Judge King); *Trees v. Glenn*, 319 Pa. 487, 181 Atl. 447 (1935, opinion by Mr. Justice Schaffer)*. Furthermore, the right of the Alu-

* This case is inadvertently cited in appellant's brief as 319 Pa. 485.

minum Company to an injunction is broader than the doctrine of *res adjudicata* as shown by *Kessler v. Eldred,* 206 U. S. 285, 288-289 (1907, opinion of Mr. Justice Moody), and is to that extent greater than any right that it could plead in bar in the New York suit. The Aluminum Company had the right to proceed in the court of original jurisdiction and cannot be compelled to submit its rights to the New York court.

Government counsel raise a fictitious issue in their contention (brief, pp. 46-49) that the Aluminum Company will suffer no irreparable injury as a result of the maintenance of the New York suit, either because of the inconvenience to it of defending its life at a distance from its books, records and principal office or because of the necessity of employing New York counsel. Testimony to this effect was offered simply to demonstrate the extent of the inconvenience inflicted upon the Aluminum Company by the maintenance of the New York suit. We do not take the position that it constitutes irreparable injury. But it is a factor which the Court is entitled to consider. However, it did not constitute the irreparable damage of which the Aluminum Company complains. That arises from the threat of concurrent regulatory decrees.

III.

The Attempted Classification of the Injunction Cases Is Unsound.

Government counsel contend (brief, pp. 32-46) that all cases wherein parties have been enjoined from proceeding in a second suit fall into three categories, namely (brief, pp. 32-33), (1) "Where the first court has actual or potential jurisdiction over a *res,* such as a bankrupt estate and the second suit would interfere with the exclusive jurisdiction of the first court to ad-

minister the *res*"; (2) "Where the *defeated** litigant in the first suit institutes a proceeding in a second court to relitigate the issue and deprive the successful litigant of the fruits of his victory"; (3) "Where one of the litigants in the first suit *before final adjudication** institutes additional suits on the identical subject matter for the purpose of harassing and vexing his adversary by relitigating issues awaiting final determination in the first suit." It is then contended that the case at bar falls into none of these categories. The reason it does not is because the categories were designedly narrowed to exclude this case, as the italicized (and gratuitous) limitations in the second and third categories show.

This analysis reflects the ingenuity of Government counsel rather than the ruling of any court. There is no such classification of the authorities to be found in any case or textbook. No case or authority states that the right to an injunction is limited to these three situations. The cases (as a reading of any of them will show) are rested on the much broader premise that whenever a court, proceeding *in personam* or *in rem*, has taken jurisdiction of a particular subject matter or issue, it is the right and duty of that court to protect that jurisdiction, and the litigants before it, by enjoining proceedings in a second jurisdiction on substantially identical subject matter and issues.

Let us look at the first asserted category (*supra*, p. 18). Obviously, the supervisory nature of the jurisdiction exercised by the Pennsylvania Court over the ever-changing affairs of the Aluminum Company bears a close analogy to the jurisdiction of a bankruptcy court over the property of a bankrupt or over a

* Italics ours.

corporate reorganization under the Bankruptcy Act. It is submitted that the Pennsylvania Court, by its assumption of a perpetual regulatory jurisdiction over the Aluminum Company, has assumed jurisdiction over the subject matter and issues presented in the New York petition and has assumed jurisdiction of a *res* or its equivalent far more definitely and realistically than had the bankruptcy court in *Steelman, Trustee v. All Continent Corp.*, 301 U. S. 278 (1937, opinion by Mr. Justice Cardozo), or in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935, opinion by Mr. Justice Sutherland), both of which cases resulted in injunctions protecting the jurisdiction of the first court. Indeed, this Court specifically declined to put its ruling in the *Steelman* case on the ground that a *res* was involved, it being stated of the trustee (301 U. S. 278 at p. 291):

> "He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. . . . . What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong."

Nor did the *Continental-Illinois Bank* case turn upon the fact that the first court was protecting its possession of a *res*. This Court pointed out (294 U. S. 648 at p. 676) that the case was a proceeding under Section 77 of the Bankruptcy Act involving not the liquidation of corporate property but merely a reorganization of corporate structure. The injunction was sustained (*id.* at pp. 675-676) on grounds in no way confined to the protection of a *res*.

Government counsel emphasize (brief, pp. 26, 36-37) *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922, opinion by Mr. Justice Sutherland), as though it contained some important qualification on the right to enjoin proceedings in a second court. Government counsel's statement of the case (brief, p. 26) is a sufficient statement of the reason why no injunction was granted. The Burke Construction Company instituted suit for a *money judgment* for breach of a street-paving contract. The defendant thereafter brought suit against the plaintiff and the sureties on its bond upon the same contract in another court, it also seeking a money judgment. The plaintiff in the first suit sought to enjoin the prosecution of the second suit and failed for the obvious reason that there was nothing involved in either suit but a judgment for money. Neither judgment could interfere with the other.

Government counsel's second category (*supra*, p. 19), if stated as broadly as the cases require, should include the right of *any* litigant, not merely the victorious litigant, to prevent relitigation in a second forum of the issues litigated in the first suit. So stated, the Aluminum Company has the right to the protection of an injunction against the relitigation in the New York suit of the issues adjudicated by the Pennsylvania decree. Surely it needs no demonstration that a defeated litigant is entitled to protection from relitigation at the hands of a victorious litigant. The category was obviously confined by Government counsel to the converse case to avoid confessing error in the case at bar.

Government counsel's third category (*supra*, p. 19) deals with cases in which a party, *prior to a final decree*, institutes vexatious suits to relitigate issues pending in the first suit. The attempt of Government counsel to limit this category so as to exclude the case at bar is

shown by the italicized words. The italicized qualification in this third category that the second suit must be started *prior to the final decree* in the first suit finds no counterpart in the second classification, nor is the spurious qualification in the second group, to the effect that the *defeated* party in the first suit must be the moving party in the second, repeated in the third, showing plainly enough that neither has any validity.

The injunction in *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273 (1906, opinion by Mr. Justice White) was granted 25 years *after the final decree* of the first court. It is never the right of a party to relitigate in a second court issues which the first court has adjudicated or over which it has retained jurisdiction, regardless of whether the first litigation has proceeded to a final decree or whether the second suit is vexatious. It is hard to see how the second suit could ever be anything else.

The cases supporting an injunction go well beyond the case at bar. The first court in *Kessler v. Eldred, supra*, 206 U. S. 285, never had before it the defendant in the second suit and yet it issued an injunction. In *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214 (1918, opinion by Mr. Justice Clarke), and in *Georgia Power Co. v. Tennessee Valley Authority*, 89 F. (2d) 218 (C. C. A., 5th Circ., 1937, opinion by Judge Foster), the first court had done no more than pass upon a preliminary injunction application, denying it in the TVA case,* and yet injunctions were issued against prosecutions of the second suits.

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* It is inadvertently stated at page 44 of appellant's brief that in both cases "the first court had merely denied a temporary injunction without passing in any way upon the propriety of a permanent injunction." The temporary injunction had been granted in the *Looney* case.

IV.

Alleged Impairment of Government's Statutory Rights.

It is contended by Government counsel (brief, pp. 52-59) that an injunction would defeat the statutory right and duty of the United States to enforce the Sherman Act. It is said that if the Government proceeds by supplemental petition in the Pennsylvania suit it will involve the addition of new parties defendant and the taking of evidence in support of the correctness of some of the averments of fact subsequent to 1912. Both are accomplished as easily in the Pennsylvania suit as in the New York suit. Section 5 of the Sherman Act was relied upon by the Government in the New York suit to sustain the venue against all parties defendant and it would be equally efficacious in the Pennsylvania suit. Government counsel concede (brief, p. 45) that the Pennsylvania decree "is perpetual and may be enforced and revised". If enforcement or revision involved bringing additional parties defendant on the record, it could be done as easily as Government counsel were added as parties on April 29, 1937 (R. 135). The lapse of time is no bar to such a procedure. Witness the expediting certificate (R. 157) filed after the suit was 25 years old. No one contends that the Government should try 40 defendants in the Pennsylvania suit and 23 in the New York suit, and the argument to this effect (brief, p. 55) complains of a purely imaginary situation.

A hypothetical contention is next advanced (Government counsel's brief, p. 59) that, if two of the defendants in the New York suit had been previously tried in other courts on subject matter and issues substantially identical to those raised in the New York suit, it would be difficult to reconcile the Government's rights under Section 5 of the Sherman Act with the

right of a party defendant to be tried in only one court on substantially identical subject matter and issues. If and when two or more of the defendants in the New York suit have been previously tried in other and differing jurisdictions on substantially identical subject matter and issues, it would seem to be time enough to determine which of these two positions should prevail. There is no such dilemma today. This Court, speaking by Mr. Justice Holmes, has said [*Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355 (1908)] that:

> "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."

Government counsel say (brief, p. 57) that it has never been the practice of the Government to proceed by supplemental petition in an anti-trust case where there are new defendants and a *new* cause of action. And we assert with confidence that it is equally true that the Government has *always* proceeded by supplemental petition in the first court when it sought further relief under the Sherman Act against the same parties on a subsequent development of the original cause of action: *United States v. International Harvester Co., supra,* 274 U. S. 693; *United States v. Standard Oil Co. of N. J.*, 47 F. (2d) 288 (E. D. Mo., 1931, opinion by Judge Stone).

The cases cited by Government counsel at pages 58-59 of their brief do not prove the contrary. The first alleged instance is the Packers' consent decree of 1920, and the earlier case of *Swift & Co. v. United States,* 196 U. S. 375 (1905, opinion by Mr. Justice Holmes). The

first Packers' case concerned agreements in restraint of trade arising in connection only with noncompetitive bidding in fresh meats, noncompetitive price fixing, and interference with various transportation facilities. The Packers' consent decree of 1920 in substance enjoined the Packers from holding any interest in public stockyard companies, or from engaging in the retail meat or wholesale grocery business, but did not involve the violations of the Act enjoined in the earlier decree.

Nor did *Standard Oil Company of Indiana v. United States,* 283 U. S. 163 (1931, opinion by Mr. Justice Brandeis) involve a violation of law similar to that adjudicated in *Standard Oil Company v. United States,* 221 U. S. 1 (1911, opinion by Mr. Chief Justice White). In the later litigation there was before the court an alleged patent pool and that alone. In the original *Standard Oil Company* case there is no part of the decree except Section 6 which by any possibility could be applied in the later case.* A reading of Section 6 demonstrates that nothing in that section contained could apply to this patent pool. Speaking of Section 6, this Court said in *Standard Oil Company v. United States, supra,* 221 U. S. 1, at p. 81:

> ". . . we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved."

Since in the *Standard Oil Company of Indiana* case the decree in the original *Standard Oil Company* case

* The decree is set forth at length in Decrees and Judgments in Federal Anti-Trust Cases at pp. 136-144.

could not possibly apply, and since in both the *International Harvester Company* case and the case of *United States v. Standard Oil Company of New Jersey, supra,* 47 F. (2d) 288, the old decrees could have applied, there is a plain distinction between the *Standard Oil Company of Indidna* case and the other two cases.

The next cited instance is of an unreported temporary injunction granted against certain railroads enjoined in *United States v. Trans-Missouri Freight Assn.,* 166 U. S. 290 (1897, opinion by Mr. Justice Peckham). Examination reveals that the conspiracy enjoined in the earlier case was not the subject matter of the second case, the latter being a suit to enjoin certain freight rates initiated under the Interstate Commerce Act of 1906. The earlier case dealt with a freight pool. Furthermore, the second case never proceeded beyond a preliminary restraining order which was in effect for less than a month and was then dissolved on motion of a United States attorney.

We have no way of checking the subject matter involved in the unreported decree against the *Corn Derivatives Institute,* cited by Government counsel at p. 59 of their brief. However, it should be noted that the defendant corporation in the first Corn Products case was there decreed dissolved so that it is more than a fair assumption that the subsequent litigation was against some other party.

V.

The Jurisdiction of the Expediting Court.

Government counsel still stand on their special appearance (brief, pp. 60, 64). Since filing that special appearance (R. 136), Government counsel have participated in the preliminary injunction hearing, filed an answer to the merits, brought about the creation of the Expediting Court (R. 157) and participated in the final injunction hearing before the Expediting Court, both cross-examining the witnesses for the Aluminum Company and submitting evidence of their own.

The Aluminum Company objected (R. 162) to the creation of the Expediting Court and to the participation of Government counsel in the deliberations of that court, but offered to withdraw those objections if Government counsel would withdraw their special appearance or otherwise concede that they were amenable to the decrees of the Expediting Court, it being stated in the objection that it was not sought by this concession to obtain any waiver of the position of Government counsel that they were cloaked with immunity from suit or that the United States was likewise immune from suit. These objections were overruled and the rulings assigned as the 25th, 26th and 27th assignments of error (R. 203-206). The Expediting Court, in overruling the objections, refrained from any discussion of the merits of the special appearance, reserving decision on that question in order to decide the merits of the controversy (R. 183).

Is it not anomalous that a statutory court may be invoked by parties who deny the jurisdiction over them of the court they create? It enables such parties to take the benefit of a favorable decree, as has been done

in this case, while reserving the right to challenge the court's jurisdiction if the decree should be unfavorable.

It is submitted that this cannot be and that the Expediting Court was either improperly created or the special appearance of Government counsel waived.

Respectfully submitted,

WILLIAM WATSON SMITH,
FRANK B. INGERSOLL,
LEON E. HICKMAN,
Solicitors for Aluminum Company of America.